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No. 00-381

In the Supreme Court of the United States

CITY OF BRIDGETON, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration, in preparing an environmental impact statement for a federally-funded construction of a new runway at the Lambert-St. Louis International Airport, made a reasonable determination to eliminate from further evaluation alternatives that did not provide dual simultaneous independent Instrument Flight Rules arrivals, on the ground that such alternatives would not adequately achieve the project's underlying purpose of alleviating current and future delays and capacity limitations.

2. Whether the court of appeals erred in finding that the Federal Aviation Administration applied appropriate criteria and analysis to determine which alternative minimized harm to pertinent resources.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 212 F.3d 448.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36a-37a) was entered on April 7, 2000. A petition for rehearing was denied on June 13, 2000 (Pet. App. 38a). The petition for a writ of certiorari was filed on September 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These consolidated cases arise from a long-studied proposal to construct a third parallel runway at the Lambert-St. Louis International Airport (Lambert).

Owned by the City of St. Louis, Lambert provides commercial air carrier service to the 2.5 million residents of the St. Louis Metropolitan Area, is a major and necessary hub within the National Airspace System, and is consistently one of the twenty most active airports in the United States. Gov't C.A. Br. 10. On September 30, 1998, the Federal Aviation Administration (FAA) issued its Record of Decision (ROD) for the proposed project. In the ROD, the FAA approved the expansion of the Lambert runway system and approved, among other things, the final environmental impact statement (FEIS) and the "Section 4(f)" analysis required by the Department of Transportation Act, and federal funding for the expansion. *Id.* at 49. The court of appeals affirmed the FAA's decision to approve the project. Pet. App. 5a-27a.

1. a. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to prepare an environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). As part of that statement, the agency must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. 1502.14(a); see 42 U.S.C. 4332(2)(C)(iii).

b. Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(c), was enacted to protect public parks, recreation areas, and historic sites.[1] Section 4(f)

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[1] Section 4(f) was originally codified as 49 U.S.C. 1653(f) (1970). In 1983, Section 4(f) was repealed and recodified without substantial change at 49 U.S.C. 303(c). See Act of Jan. 12, 1983, Pub. L. No. 97-449, § 1(b), 96 Stat. 2419. Courts and agencies commonly

provides that the Secretary of Transportation may approve a transportation program or project requiring use of "publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance" only if "there is no prudent and feasible alternative to using that land;" and "the program or project includes all possible planning to minimize the harm" to the protected resources. 49 U.S.C. 303(c).

2. a. Lambert "is one of the nation's busiest and most delay-ridden airports." Pet. App. 2a. In 1996 it ranked fourteenth for total passengers emplaned and deplaned, and eighth in total aircraft operations,[2] while also ranking second highest among all United States airports in terms of aircraft delays of fifteen minutes or more per every 1000 aircraft operations. See *id.* at 2a-3a; FEIS 1-10, 2-7 (Bridgeton C.A. App. 308, 323); see also 21 A.R. Doc. 2, at 187. Based upon aircraft delays, the FAA considers Lambert to be one of 23 "delay-problem" airports which frequently cause bottlenecks in the nation's aviation system. ROD 68 (Bridgeton C.A. App. 1595).

Lambert's delay problems stem from a lack of capacity. In particular, for takeoffs and landings, Lambert relies upon two parallel northwest/southeast runways known as 12L/30R and 12R/30L (the numbers denote the compass direction the aircraft faces when on the runway). The centerlines of these two runways are

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refer to the current 49 U.S.C. 303(c) as "Section 4(f)" or "Section 303(c)." Documents in the Administrative Record supporting the Federal Aviation Administration's decision here primarily refer to Section 303(c), but use both terms interchangably.

[2] Total aircraft operations include the sum of landings and takeoffs.

separated by only 1300 feet. See Pet. App. 3a. This close spacing means that, under FAA flight rules, arrival streams on one runway are "dependent" upon approaches on the other runway.[3] Gov't C.A. Br. 11.

The close spacing of the runways becomes particularly troublesome during adverse weather conditions. As weather conditions deteriorate and pilots and air traffic controllers cannot rely upon visual flight rules, instrument flight rules must be used and the airport is reduced to using only one runway with a precision instrument, *i.e.*, advanced radar, approach. FEIS 1-10; ROD 3 (Bridgeton C.A. App. 308, 1523). Because adverse weather conditions requiring instrument flight rules occur 14% of the time at Lambert, the lack of capacity resulting from the closely spaced runways frequently results in substantial delays. 26 A.R. Doc. 1, at 43 (Table B-1) (Gov't C.A. App. 213). And because Lambert is a major, centrally-located hub, delay at Lambert resulting from its "ineffective functioning during inclement weather often disrupts the flow of air traffic nationwide." Pet. App. 3a; see also FEIS 2-19 to 2-22 (Bridgeton C.A. App. 335-338).

Between 1989 and 1993, St. Louis[4] developed a long-term master development plan for Lambert to ensure that the airport will meet both local and national demands. See FEIS 1-11; ROD 12 (Bridgeton C.A.

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[3] Under FAA rules, runways must be separated by a minimum of 4300 feet in order to permit independent simultaneous arrivals unless the runways are served by a Precision Runway Monitor, a navigational aid system comprised of rapid update radar, which permits independent parallel approaches for runways spaced 3400 feet apart. Gov't C.A. Br. 17 n.17.

[4] As used in this brief, "St. Louis" refers to either the city of St. Louis, which owns Lambert, to the St. Louis Airport Authority, which operates Lambert, or both.

App. 309, 1534). Based upon aviation demand forecasts through 2010, a "master plan" was drafted to provide a framework for maximizing potential capacity, reducing delay, and providing a basis for future development decisions. Gov't C.A. Br. 12-17.

During the master plan process and supplemental study, St. Louis, with vital input from FAA, developed more than forty development concepts for Lambert to determine what improvements would best meet projected airport needs by increasing capacity in marginal to poor weather conditions as well as during good weather. See FEIS at S-4, 3-3; ROD 6 (Bridgeton C.A. App. 264, 346, 1526); Pet. App. 4a. Because of the urban location and development surrounding Lambert, any runway construction project for the airport will require land acquisition in a community surrounding the airport. Gov't C.A. Br. 20 n.21.

After more than a decade of study, St. Louis selected one alternative—known as W-1W—which proposed physical improvements at Lambert including the construction of a new parallel runway located on the southwest side of the airport in the City of Bridgeton. The new runway (known as 12W/30W for planning purposes) would be spaced 4100 feet to the west of existing runway 12L/30R and 2800 feet from existing runway 12R/30L. Once 12W/30W is built, 12R/30L will become the center runway. Pet. App. 4a. The new runway is expected to increase Lambert's capacity in all weather conditions by providing for two simultaneous arrival streams that (using the precision runway monitor) can land independently of one another. The new runway also would contribute to more efficient departures. Thus, the new runway would eliminate Lambert's capacity obstacle and allow the airport to meet projected demand forecasts with acceptable delay levels, pro-

viding "significant far-reaching benefit [for] the entire national system." FEIS 2-23 to 2-25, 2-6 to 2-8 (Bridgeton C.A. App. 339-341, 322-324).

b. After selecting W-1W, St. Louis prepared and submitted to the FAA a revised Airport Layout Plan for environmental approval necessary to apply for federal funds. Gov't C.A. Br. 23. For the proposed improvements, the FAA, pursuant to Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), prepared a comprehensive three-volume final environmental impact statement examining reasonable alternatives for and reasonably foreseeable environmental impacts of the proposed project. The FEIS describes the proposed federal action as acquisition of approximately 1568 acres of land, construction of a new 9000 foot runway capable of handling air carrier jet aircraft, and construction of other projects necessary for use of the runway. FEIS 2-2 to 2-4 (Bridgeton C.A. App. 318-320).

The FEIS stated that the purpose of the proposed expansion projects was fourfold: (1) enabling Lambert to accommodate projected levels of aviation activity at an acceptable level of delay by increasing airport capacity; improving visual flight rules (VFR) capacity; allowing dual simultaneous independent instrument flight rules (IFR) arrival operations; and decreasing delays; (2) enhancing the National Airspace System through reducing delays and increasing capacity; (3) recognizing and nurturing the important economic benefits provided by Lambert to local communities and the region; and (4) facilitating the vital hub at Lambert. FEIS 2-1 (Bridgeton C.A. App. 317). The FEIS also

explained that the proposed actions are needed because

1. The existing airport is severely constrained and is projected to be unable to adequately meet projected levels of demand without incurring unacceptable operational delays.

2. As an important component of the National Airspace System, Lambert cannot be allowed to become a "bottleneck," because it would have detrimental ripple-effects throughout the airspace system; and

3. The airport serves an important function in providing economic benefits important to the airport sponsor and the region.

Id. at 2-1 to 2-2 (Bridgeton C.A. App. 317-318).

The FEIS analyzed five categories of alternatives for improving Lambert including (1) using other modes of transportation; (2) using existing or proposed nearby airports to supplement Lambert; (3) constructing a new or replacement airport; (4) using the existing Lambert configuration with advanced navigational aids; and (5) employing an alternative runway configuration to expand the airport. See FEIS 3-4, 3-10 to 3-54 (Bridgeton C.A. App. 347, 353-397).

In analyzing potential runway configurations, the FAA examined geographically-related families of design configurations that had been identified during the master planning process. The first family consisted of three distinct runway alignments located in the northern portion of the airfield: N-1, NE-1, and NE-1a. The second family consisted of runway alignments in the western portion of the airfield: W-1E, W-1W, and W-2. One alternative was considered for development in the southern portion of the airfield: S-1. Each

geographic family included at least one alternative that provided for sufficiently spaced parallel runways to permit simultaneous independent arrivals in poor weather. The master plan alternatives also included a derivative of the original F-4 (chosen and later rejected), known as the Canted Alternative or C-1, and a no-action alternative. Pet. App. 9a-10a; Gov't C.A. Br. 13 n.11.

In the FEIS, to identify and analyze the alternatives that would meet the project's purposes and needs, the FAA used a three-tiered screening process.[5] Through this process, the FAA winnowed the alternatives down

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[5] The first tier attempted to ascertain whether an alternative provided certain factors pertaining to specific criteria identified in the Purpose and Need, namely the ability to increase airfield capacity in good and bad weather and reduce aircraft delay time; the ability to enhance/benefit the National System capacity; and the ability to maintain the passenger hub airport and consistency with local planning and economic goals. FEIS 3-6 to 3-7 (Bridgeton C.A. App. 349-350).

Tier Two evaluated "constructability" criteria such as (1) the ability to maintain continuous 24-hour operations; (2) complexity of staging, phasing, and construction activities; (3) coordination and integration with other development projects; and (4) ability to obtain required permits. To meet the constructability criteria, an alternative must be "buildable without an overwhelming amount of potential construction concerns or interference with the ability to maintain hubbing activities at Lambert." FEIS 3-7 (Bridgeton C.A. App. 350). Tier Two also evaluated the benefit-cost ratio (BCR) of the alternative. *Ibid.* Alternatives satisfying constructability and BCR needs were retained for evaluation at Tier Three. Gov't C.A. Br. 28-29.

The third tier focused on specific purpose and need criteria relating to operational efficiency such as taxi times, delay times, cost per passenger, and environmental impacts (including noise, parkland resources, wetlands, environmental justice, air quality). FEIS 3-8 to 3-10 (Bridgeton C.A. App. 351-353).

by first selecting the best representative in each family based upon which alternative was best overall from an environmental perspective. FEIS 3-5 to 3-10; (Bridgeton C.A. App. 348-53) (describing tiering process). Then, the culmination of the tiering process identified two "build" alternatives–S-1 and W-1W–as reasonable and feasible to meet Lambert's needs and the purposes of the project. FAA thereafter analyzed the environmental impacts of these two alternatives in even greater detail. FEIS 3-47 to 3-49 (Bridgeton C.A. App. 390-392). Although not considered reasonable because of its lack of capacity and long delays, the FAA also considered the no-action alternative (X-1). See FEIS 3-43 (Bridgeton C.A. App. 386). Although other alternative runway alignments considered by FAA were eliminated from further detailed study because they were unreasonable or infeasible, the FEIS listed and provided detailed discussion of each of these alternatives. See FEIS at 3-31 to 3-43 (Bridgeton C.A. App. 374-386). This discussion included detailed reasons for eliminating each build alternative. *Ibid.*; see 40 C.F.R. 1502.14(a).

c. The FEIS also analyzed impacts on lands protected under Section 4(f) of the Department of Transportation Act. These protected lands include public parks, recreational areas, wildlife and waterfowl refuges, and historic sites of national, state, or local significance as well as lands purchased or developed using Section 6(f) of the Land and Water Conservation Fund Act of 1965, 16 U.S.C. 460*l*1-8(f) Additionally, the FAA prepared a separate analysis to accompany the FEIS analyzing impacts and adverse effects of the project on Section 4(f) resources. This analysis, entitled *Section 303 and 6(f) Evaluation*, includes extensive discussion of resources protected under Sections 4(f)

and 6(f). See 59 A.R. Doc. 1 (Bridgeton C.A. App. 948-1316).

The Section 4(f) analysis concluded that there were no feasible and prudent build alternatives other than S-1 and W-1W because other alternatives did not meet the goals and purposes of the project, were not constructable, were not cost-effective, or would have similar or greater adverse impacts upon protected resources. See FEIS at 5-115 to 5-116 (Bridgeton C.A. App. 618-619). The FAA further concluded that the W-1W alignment causes the least damage to Section 4(f) resources. The FEIS identifies mitigation measures to further reduce adverse impacts. FEIS 5-116, FEIS Section 6 (Bridgeton C.A. App. 619, 742-786). For historic sites, FAA consulted with the Advisory Council on Historic Preservation and the Missouri State Historic Preservation Officer. See 60 A.R. Doc. 1 (Bridgeton C.A. App. 1316-1401). To ensure proper mitigation of impacts on historic sites, and to fulfill requirements of the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*, before approval of the Lambert project, the FAA, the Advisory Council and the Missouri Historic Preservation Officer entered into a Memorandum of Agreement. See 70 A.R. Doc. 2, at 80 (Gov't C.A. App. 462).

d. After issuing the FEIS, on September 30, 1998, the FAA issued its Record of Decision approving St. Louis's proposal for expansion of Lambert, including construction of runway W-1W. See ROD 123-124 (Bridgeton C.A. App. 1653-1654).[6] The ROD includes

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[6] Specifically the ROD approved the project for federal funding of land acquisition; site preparation; runway, taxiway, and runway safety area construction; landside developments including roadways; navigational aids; acquisition and relocation of the Missouri

FAA's findings under Section 4(f) that W-1W and S-1 are the only feasible and prudent alternatives and that W-1W was the alternative that minimized significant adverse effects on natural resources and historic properties. See ROD 115 (Bridgeton C.A. App. 1644); 70 A.R. Doc. 2, at 80 (Gov't C.A. App. 462) (Memorandum of Agreement). Additionally, the ROD addressed issues raised in post-FEIS information submitted to FAA in comments and at meetings with the agency. See ROD 65-111 (Bridgeton C.A. App. 1592-1639); Pet. App. 6a-8a (describing ROD).

3. After the FAA issued the ROD, the City of Bridgeton filed a petition for review challenging the FAA's decision under NEPA, Section 4(f) of the Department of Transportation Act (49 U.S.C. 1653(f) (1970), recodified, 49 U.S.C. 303(c)), and Section 509(b)(1)(A) of the Airport and Airway Improvement Act of 1982, 49 U.S.C. 47106(a)(1).[7]

National Guard facilities; terminal facility improvement and new terminal facilities; and environmental mitigation. ROD 123-124 (Bridgeton C.A. App. 1653-1654).

[7] In the court of appeals, the City of St. Charles and the County of St. Charles also petitioned for review of the FAA's ROD. Only the City of Bridgeton has filed a petition for a writ of certiorari. With respect to NEPA, the court of appeals held that the FAA had adequately analyzed the adverse environmental impacts of the Lambert expansion, including adverse impacts of increased aircraft overflight noise on the City and County of St. Charles, and of measures to mitigate such impacts. Pet. App. 17a-19a; see also 40 C.F.R. 1502.14-1502.16. The court upheld FAA's choice of noise measurement methodology and refused to require FAA to use the methodology preferred by the St. Charles petitioners. *Ibid.* In addressing Section 4(f) the court of appeals also rejected arguments presented by the St. Charles petitioners regarding the alleged "use" of historic properties by noise from the project. The court of appeals found that noise from the Lambert

The court of appeals upheld the FAA decision. In pertinent part, the court held that the FAA had complied with NEPA, 42 U.S.C. 4321 *et seq.*, by considering a reasonable range of alternatives. The court of appeals held that the FAA appropriately examined "the eight Lambert expansion alternatives considered by St. Louis, plus a no-action alternative and off-site options," and appropriately used a "three-tiered screening process to identify those runway expansion alternatives that would meet the project's purpose and need." Pet. App. 9a. Based upon this process, the court of appeals held that the FAA reasonably selected the alternatives to be analyzed in detail and properly discussed "why the other runway expansion alternatives were eliminated from detailed consideration." Pet. App. 11a-17a.

The court also held that FAA's approval of W-1W complied with Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(c). The court held that FAA appropriately rejected certain alternatives preferred by petitioner that "would not meet the project's transportation purposes and needs" as not "feasible and prudent" within the meaning of Section 4(f). Pet. App. 23a. Noting that FAA had performed an "extensive comparative § 4(f) analysis" (Pet. App. 24a), the court of appeals upheld FAA's selection of alternative W-1W over alternative S-1 as the environmentally superior alternative. Pet. App. 24a-25a. The court explained:

> The various studies in the record confirm that W-1W would affect historic sites in Bridgeton, while S-1 would have a greater impact on parks in other

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expansion will not "use" the St. Charles Historic District because the District falls outside the 65 dB noise contour and will not be significantly impacted by the project. Pet. App. 19a-21a.

> communities. However, the FAA did far more than merely total up the acres and make a superficial § 4(f)(2) decision. The agency catalogued in detail the nature of each property that would be affected under both alternatives. It discussed each site's location, its size, its function, its significance, the activities associated with it, and the degree to which it would be adversely affected. And most significantly, the agency developed detailed plans to avoid, reduce, or mitigate adverse § 4(f) impacts * * *.

Pet. App. 24a-25a. Based upon its review of the record, the court concluded that FAA's selection of W-1W was properly based upon "relevant factors and an appropriate § 4(f) analysis." *Id.* at 25a.[8] Judge Arnold dissented. In pertinent part, he opined that the FAA improperly failed to include alternative NE-1a within its detailed alternatives analysis under NEPA. Pet. App. 29a-33a.

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[8] The court of appeals rejected petitioners' challenges under the Airport and Airway Improvement Act of 1982. The court found that the FAA reasonably relied upon the findings of the regional planning commission in determining that the project was "consistent with plans (existing at the time the project is approved) of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport." Pet. App. 25a (citing 49 U.S.C. 47106(a)(1)). The court of appeals also held that, because the W-1W project will not extend into St. Charles County, the County lacked standing to pursue its claim that the ROD improperly failed to certify that the project sponsor had advised "the communities in which a project is located" of the right to "petition the Secretary." 49 U.S.C. 47106(c)(1)(A)(ii). See Pet. App. 27a (citing *Bennett* v. *Spear*, 520 U.S. 154, 163-165 (1997)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the decision below turns on the particular circumstances of this case and presents no question of exceptional importance meriting review by this Court.

1. NEPA requires that an environmental impact statement discuss, among other things, "alternatives to the proposed action."[9] 42 U.S.C. 4332(2)(C)(iii). Petitioner contends that the Eighth Circuit's ruling is contrary to the fundamental purpose of NEPA because it allows federal agencies to avoid analyzing alternatives that it or the project proponent does not prefer. Pet. 12. This contention is without merit.

The court of appeals correctly held that the FAA defined its objectives in a reasonable manner and reasonably excluded the NE-1a "build" alternative, consisting of adding another closely-spaced parallel runway to the southeast, from further detailed consideration in the FEIS in light of the purposes of and need for the project. The court held that FAA reasonably elevated independent simultaneous arrivals capability as a "critical element of its overall purpose to increase airport capacities and reduce delays." Pet. App. 13a-14a. The court specifically noted FAA's "logical criterion" indicating that runway capacity problems "can usually be most improved by the construction of

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[9] As the court of appeals recognized (Pet. App. 8a-9a), although NEPA establishes "significant substantive goals for the Nation, [the duties it] imposes upon agencies * * * are 'essentially procedural.'" *Strycker's Bay Neighborhood Council, Inc.*, v. *Karlen*, 444 U.S. 223, 227 (1980) (quoting *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978)).

another parallel runway" and "delays can be reduced by the construction of a parallel runway at a sufficient spacing * * * that allows for dual simultaneous Instrument Flight Rules (IFR) operations" during adverse weather conditions (*id.* at 14a). Further, the court found that FAA's statistical data supported the need for simultaneous arrivals capability at Lambert to meet both the short-term and long-term needs of the airport. *Ibid.* The court did not permit the FAA to avoid analyzing reasonable alternatives based on the preferences of the project proponents; rather, it held that, based upon data predicting annual delays, cost and constructability concerns, and potential interference with hub operations, the FAA reasonably eliminated other build alternatives from further detailed study.

2. Petitioner asserts that the court of appeals' decision conflicts with decisions of the Seventh and Eleventh Circuits. Pet. 8-11. That claim is incorrect. The Seventh, Eleventh, and Eighth Circuits agree that an agency must reasonably define the objectives of a proposed project and that the agency's choice of alternatives must be reasonable in light of those objectives. See Pet. App. 9a, 11a, 15a; *Simmons* v. *United States Army Corps of Eng'rs*, 120 F.3d 664, 668-669 (7th Cir. 1997); *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1541-1542 (11th Cir. 1990); *Van Abbema* v. *Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). Those courts also recognize that an agency may not evade its obligations under NEPA by imposing an artificially narrow definition of project objectives. Pet. App. 15a; *Simmons*, 120 F.3d at 666; *North Buckhead*, 903 F.2d at 1542.

In *Simmons*, the court held that the Army Corps of Engineers had failed to consider an acceptable range of alternatives to a proposed dam and reservoir that was

intended to supply water to the City of Marion, Illinois, and the Lake of Egypt Water District. 120 F.3d at 666. The Corps had "defined the project's purpose as supplying two users (Marion and the Water District) from a single source." *Id.* at 667. The court of appeals found that purpose to be unreasonably narrow because the Corps had neither considered nor explained why it was preferable that both users be supplied by a single source. See *ibid.* ("At no time has the Corps studied whether this single-source idea is the best one – or even a good one."); *id.* at 668 ("Why the Corps assumed the imperative of a single-source project * * * remained unexplained."). The court concluded that, by so defining the project goal, the Corps essentially "rigged the environmental impact statement." *Id.* at 669.

In the instant case, by contrast, the FAA did not define the project objectives in such a way as to rig the outcome. Consistent with *Simmons*, it reasonably defined the goals of the project as reducing delay in the short term, accommodating the long-term demands faced by the airport, and permitting Lambert to maintain its hub status without requiring construction of an additional new runway before 2015. Pet. App. 12a-15a. The FAA did not limit itself to studying the alternatives that provided independent simultaneous IFR arrivals capacity until it determined that such capacity was needed to meet the general project goals.

Petitioner suggests that the FAA erred in eliminating NE-1a from detailed study because FAA unreasonably focused upon NE-1a's failure (based upon the close spacing of its runway configuration) to provide for dual simultaneous independent arrival capacity. Pet. 10-11. According to petitioner, because NE-1a would provide some temporary increased capacity and reduction in delay, it met the "general" purposes and goals of

the project. Thus, its failure to provide a specific "method" (independent simultaneous arrivals) of increasing capacity and reducing delay did not render it an unreasonable alternative.

The court of appeals rejected petitioner's contention not, as petitioner suggests, because the court "conflate[d] project purposes with methods for achieving those purposes" (Pet. 9), but because data projecting increased passenger demand at Lambert, and consequent need for greater short-term and long-term capacity, indicated that NE-1a was, at best, a short-term strategy which did not meet the long-term goals of increasing capacity and reducing delay for overall efficient operation of Lambert and the National Airspace System. See 20 A.R. Doc. 1, at 4-12 (Gov't C.A. App. at 48); 20 A.R. Doc. 3, Exh. M (Bridgeton C.A. App. 116); FEIS 3-32 (Bridgeton C.A. App. 375). See also Pet. App. 14a-15a (noting that, based upon capacity and delay studies in the Administrative Record considered by FAA, FAA concluded that "NE-1a is essentially a short-term strategy whose delay-reducing limitations would require St. Louis to begin planning for additional runway construction and land acquisition 'long before the year 2015.'"). Thus, the court held that, to meet its long-term goals of increasing capacity and reducing delay, the FAA reasonably considered in greater detail only those alternatives that provided independent simultaneous IFR arrivals capacity. *Ibid.* The decision of the court of appeals is consistent with *Simmons*.

The decision also is consistent with *Van Abbema*. The court in *Van Abbema* stated that "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative

means by which a particular applicant can reach his goals." 807 F.2d at 638. The Seventh Circuit held that the agency, in conducting NEPA analysis, may be required to treat as "reasonable alternatives" measures that a particular permit applicant is incapable of implementing. See *ibid.* ("The fact that this applicant does not now own an alternative site is only marginally relevant (if it is relevant at all) to whether feasible alternatives exist to the applicant's proposal."). *Van Abbema* in no way conflicts with the court's decision here. The alternatives that the Secretary considered were not limited by reference to a permit applicant's particular capabilities; rather, they were limited only after consideration of and with reference to the project goals.[10] The FAA's determination that it would not subject alternative NE-1a to further detailed study was

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[10] In *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190 (D.C. Cir. 1991), the court expressed concern that the *Van Abbema* court's reference to "the *general* goal of an action" might imply that the reviewing court is itself to define the relevant goal. See *id.* at 199 (emphasis added). The court explained that "[l]eft unanswered in *Van Abbema* * * * is why and how to distinguish general goals from specific ones and just who does the distinguishing. *Someone* has to define the purpose of the agency action. Implicit in *Van Abbema* is that the body responsible is the reviewing court." *Ibid.* The Seventh Circuit has since recognized, however, that in assessing a federal agency's compliance with NEPA, a reviewing court owes deference to the agency's definition of a project's goal. See *Simmons*, 120 F.3d at 668-669; see also Pet. App. 15a. The District of Columbia Circuit also expressed doubt regarding the correctness of the conclusion in *Van Abbema* that NEPA requires an agency to consider alternatives to a private applicant's proposal that could not be considered a "major Federal action[] significantly affecting the quality of the human environment," see *Citizens Against Burlington*, 938 F.2d at 199 (quoting NEPA), but that question is not implicated here.

reasonable under *Van Abbema* because, as the FAA found, and the court of appeals agreed, NE-1a did *not* meet the "general" goals of the project. The FAA explained that it would not conduct further review of NE-1a, not merely because it did not provide independent simultaneous approaches, but also because it was a short-term strategy that would require another runway project at Lambert before 2015 and, in the meantime, could not provide sufficient capacity to meet projected demand levels.

Finally, in *North Buckhead*, the Eleventh Circuit stated in dicta that "an alternative partially satisfying the need and purpose of the proposed project may or may not need to be considered depending on whether it can be considered a 'reasonable alternative.'" 903 F.2d at 1542. The court held in that case, however, that the Federal Highway Administration was not required to undertake a detailed analysis of plaintiffs' preferred "no build/heavy rail alternative." See *id.* at 1543. The court explained that while the plaintiffs' preferred approach "would provide additional transportation capacity in the corridor, the problems of surface street congestion would remain unresolved." *Ibid.* Although petitioner contends that the approaches of the Eleventh and the Eighth Circuits are "irreconcilable" (Pet. App. 11), *North Buckhead* would not compel more extensive consideration of alternative NE-1a, which fails to meet the long-term goals of Lambert and the National Airspace System and thus is not a reasonable alternative. The decisions are easily reconciled.

3. Under Section 4(f)(2) of the Department of Transportation Act, an agency may approve a transportation project that uses park resources only if the "program or project includes all possible planning to minimize harm to the" protected resource. 49 U.S.C. 303(c)(2). Peti-

tioner contends (Pet. 12-17) that the court of appeals' holding that the FAA complied with the requirements of Section 4(f)(2) conflicts with decisions of the Fifth Circuit in *Louisiana Environmental Society (LES)* v. *Coleman*, 537 F.2d 79, 86 (1976), and the Eleventh Circuit in *Druid Hills Civic Association* v. *Federal Highway Administration*, 772 F.2d 700, 716 (1985). Petitioner claims that FAA's failure to conduct a "qualitative analysis" of the harm to resources protected by Section 4(f) violated its responsibility to select the alternative that "does the least harm to the affected Section 4(f) resources." Pet. 13. These contentions are without merit.[11]

a. The court of appeals expressly recognized the statutory requirement that the project include all possible planning to minimize harm (Pet. App. 23a). Petitioner misstates the court of appeals' decision as holding that an agency may satisfy Section 4(f)(2)'s requirement that the agency minimize harm to protected resources (Pet. 13) merely by selecting the alternative that uses the fewest acres of protected resources. An analysis of the court of appeals' decision shows that the court did not so hold. Although the FAA (and the court of appeals) noted that S-1 would impact nine properties while W-1W would impact only

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[11] Section 4(f)(1) provides that the FAA may not approve a transportation project that will use a public park or historic site unless there is no "prudent and feasible alternative to using that land." 49 U.S.C. 303(c)(1). In the court below, the petitioner challenged the FAA's determination that alternatives N-1, NE-1, and NE-1a were not prudent and feasible alternatives within the meaning of Section 4(f)(1). The court of appeals held that the FAA reasonably concluded that these alternatives were not feasible or prudent for Section 4(f)(1) purposes, Pet. App. 23a, and the petitioner has not renewed the challenge here.

four, the court of appeals found that FAA "discussed each site's location, its size, its function, its significance, the activities associated with it, and the degree to which it would be adversely affected" and "developed detailed plans to avoid, reduce, or mitigate adverse § 4(f) impacts including, with regard to historic properties, a Memorandum of Agreement with interested parties" that petitioner declined to enter into. Pet. App. 25a.[12] This detailed evaluation of the impacts of W-1W and S-1 and the degree to which each alternative would adversely effect protected resources (*ibid.*) led the FAA to conclude reasonably that W-1W was environmentally superior and would have "less severe impacts on resources protected under special purpose laws" than S-1. *Ibid.*

b. Contrary to petitioner's suggestion (Pet. 16), Section 4(f)(2)'s requirement that an agency minimize the harm of a proposed transportation project does not require an agency to develop equally detailed mitigation measures and plans for every alternative before deciding which alternative minimizes harm. The cases relied upon by petitioner (Pet. 13-16) do not hold otherwise.

Petitioner reads too much into *LES* and *Druid Hills* when it states that they require an agency to give the same "caliber of treatment" to each alternative when evaluating it under Section 4(f)(2). Pet. 16. In addressing Section 4(f)(2), both cases held that relocation of a highway "through another portion" of the impacted Section 4(f) property, or other 4(f) properties, "must be considered as a means of minimizing harm." See *LES*,

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[12] See also *Section 303 and 6(f) Evaluation*, 59 A.R. Doc. 1, at 1-14 to 1-15 (Bridgeton C.A. App. 973-974) (comparing projected impacts of W-1W and S-1).

537 F.2d at 85; *Druid Hills*, 772 F.2d at 716. Likewise, both decisions held that this requires the agency to compare the total damage to protected properties from each proposed alternative. The *Druid Hills* court concluded that, in order to facilitate that process, "the administrative record must contain adequate information to enable the Secretary to weigh the relative damage to protected properties." *Druid Hills*, 771 F.2d at 716-717; cf. *LES*, 537 F.2d at 86 (observing that the Secretary did not make "the requisite testing of the various routes" without defining the sort of testing that is required or requiring that it be exactly the same for each alternative).[13]

Thus, *Druid Hills* and *LES* require only a record on each alternative *sufficient to show* that the agency made the evaluation mandated by Section 4(f)(2); they do not mandate exactly equal treatment of alternatives. The rule petitioner attempts to draw out of these cases finds no support in them and would convert arbitrary and capricious review into a rigid requirement of equally detailed action with respect to each alternative that could not be reconciled with *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-416 (1971) (holding that, in reviewing a 4(f) decision for arbitrary or capricious action, courts should consider only "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment") (citations omitted); cf. *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190, 204 (D.C. Cir. 1991) (rejecting contention that a court can reject a 4(f)(2) determination where the FAA did

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[13] The agency is free to choose among alternatives which cause substantially equal damage. *LES*, 537 F.2d at 86; *Druid Hills*, 700 F.2d at 716.

not pinpoint an exact mitigation strategy because "federal courts are neither empowered nor competent to micromanage strategies for saving the nation's parklands.").[14]

The FAA considered both S-1 and W-1W as alternative runway alignments and concluded that, based upon the quantum of harm to resources protected under Section 4(f), W-1W is the alignment which minimizes harm. Based upon these findings, the court of appeals' decision here is directly in step with those in *LES* and *Druid Hills*. The conflict alleged by petitioners does not exist.

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[14] Both *LES* and *Druid Hills* involved federal highway projects where the chosen route for a highway and certain alternative routes used parts of parks protected by Section 4(f). See *LES*, 537 F.2d at 82-84; *Druid Hills*, 772 F.2d at 704-707. There is some reason to doubt whether the holdings of these highway improvement cases extend to the FAA's decision here to expand an airport. Airport expansion decisions lack the geographic flexibility for choice of alternative route locations typically available when planning for highway projects. And, significantly, as the court of appeals noted, airport expansion decisions are governed by the congressional mandate "that airport construction and improvement projects that increase the capacity of facilities to accommodate passenger and cargo traffic be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease" (Pet. App. 23a-24a, citing 49 U.S.C. 47101(a)(7)). The court of appeals correctly observed (*id.* at 23a) that, in order to harmonize the statutory requirements of Section 4(f) and those found in 49 U.S.C. 47101(a)(7) requiring that airport improvement projects maximize promotion of safe and efficient operations and reduction of delays, it is "doubt[ful]" that Section 4(f) "mandates [such] a rigid least harm standard in airport expansion cases." Pet. App. 23a. In any event, the panel was not asked to and did not rule on whether the least-harm standard applies in airport expansion cases. The court's analysis makes clear that it concluded that the FAA had complied with the least-harm standard. *Id.* at 23a-25a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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